

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER 98-0560  
INDIANA SALES / USE TAX**

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**I. Abatement of Penalty and Interest Assessed for Late Payment of the Indiana Gross Retail Tax.**

**Authority:** IC 6-2.5-2-1; IC 6-8.1-10-2.1(a); IC 6-8.1-10-2.1(a)(4); IC 6-8.1-10-2.1(d); 45 IAC 2.2-2-2; 45 IAC 15-11-2(b).

Taxpayer requests that the penalty and interest assessed for its late payment of Indiana gross retail tax liabilities be abated. Taxpayer maintains that the late payment was reasonable considering the pressing financial difficulties it was facing at the time the taxes became due. In addition the decision by the taxpayer's employee, otherwise responsible for making timely payment of tax liabilities, to defer payment of the taxes was not attributable to the taxpayer but was an independent and unauthorized decision by that employee for which taxpayer should not be held accountable.

**Statement of Facts**

The taxpayer is an out-of-state clothing retailer. The taxpayer operates / operated 114 outlets in 22 states. According to the taxpayer, at the time it submitted its protest in August of 1998, taxpayer was emerging from Chapter 11 bankruptcy proceedings. A recent news item indicates that the taxpayer is now "defunct" having apparently filed a second Chapter 11 bankruptcy petition. The taxpayer has not communicated with the Department and has not responded to the Department's communications since the taxpayer filed its original protest.

**I. Abatement of Penalty and Interest Assessed for Late Payment of the Indiana Gross Retail Tax.**

**DISCUSSION**

Taxpayer protests the assessment of a penalty and associated interest for late payment of Indiana sales and use tax. Taxpayer argues that the failure to pay its sales and use tax liability is attributable to its preoccupation with existing financial and bankruptcy issues

at the time the taxes became due. According to taxpayer, the decision to delay payment of its tax liability was the unilateral and unauthorized decision of a single employee who has since been discharged. Taxpayer argues that its late payment of sales and use tax was an isolated instance the discovery of which forced the taxpayer to rethink its policies and procedures in order to assure the accurate and timely reporting of taxes in the future. Since taxpayer lodged its original protest, the Department has received no further communication from the taxpayer. Taxpayer has failed to augment the information in its original protest, failed to respond to the Department's written communications, and failed to take part in the protest hearing.

Taxpayer provided little information as to the basis of its protest. Presumably, the taxpayer is protesting penalty and interest levied on the basis of taxpayer's failure to timely remit sales and use tax. Under IC 6-2.5-2-1, an excise tax known as the state gross retail tax is imposed on retail transactions made in Indiana unless a valid exemption is applicable to the transaction. Under 45 IAC 2.2-2-2, the gross retail tax is paid by the customer but the retail merchant acts as an agent for the state of Indiana and is responsible for collecting the tax. Acting as the state's agent, the seller is not only responsible for collecting the tax but must hold the tax receipts and pay them over to the state periodically. *See* IC 6-2.5-6 et seq.

Under IC 6-8.1-10-2.1(a)(4), if a person "fails to timely remit any tax held in trust for the state . . . the person is subject to a penalty." The Department is required to abate the negligence penalty if the taxpayer "can show that the failure to file a return, pay the full amount of tax shown on the person's return, timely remit tax held in trust . . . was due to reasonable cause and not due to willful neglect." IC 6-8.1-10-2.1(d). 45 IAC 15-11-2(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Taxpayer negligence can be inferred from the taxpayer's "carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations." *Id.*

Additionally, under IC 6-8.1-10-1(a), upon taxpayer's failure to pay the full amount of tax due, the taxpayer "is subject to interest on the nonpayment."

The taxpayer does not meet its burden of demonstrating that its failure to pay its tax obligation was attributable to "reasonable cause." The fact that taxpayer was experiencing financial difficulties is insufficient justification for taxpayer's failure to forward tax receipts held in trust for the state of Indiana. Similarly, taxpayer cannot escape responsibility by attributing its failure to pay taxes to a single aberrant employee. Even if, given the scant factual information supplied by taxpayer, the taxpayer's failure to pay Indiana taxes could reasonably be attributable to a single rogue employee, taxpayer necessarily retains ultimate responsibility for the actions of that employee. Taxpayer is/was a large, multi-state, sophisticated retail business fully capable of understanding and meeting its statutory responsibilities for the payment of Indiana taxes.

Unlike the negligence penalty imposed under IC 6-8.1-10-2.1(a)(4), the interest assessed for late payment under IC 6-8.1-10-1(a) is not subject to the Department's discretionary

review. Rather, IC 6-8.1-10-1(a) simply states that, upon a finding a payment deficiency, the taxpayer “is subject to interest on the nonpayment.” Absent the statutory or equitable authority to abate the interest properly imposed under IC 6-8.1-10-1(a), the Department must decline the taxpayer’s invitation to do so.

**FINDING**

Taxpayer’s protest is respectfully denied.